

SOUTH AFRICA / JUDGMENT

R.B v E.B (3893/2022) [2025] ZALMPPHC 10 (27 January 2025) [2025] ZALMPPHC 10

COURT

Limpopo High Court, Polokwane

BEFORE

M Z Makoti

CASE / FILE NUMBER

3893/2022

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

LIMPOPO

DIVISION, POLOKWANE

CASE

NO: 3893/2022

(1)

REPORTABLE: YES/NO

(2)

OF INTEREST TO THE JUDGES: YES/NO

(3)

REVISED.

DATE:

27/01/2025

SIGNATURE:

In

the matter between: R[...]
B[...]
Applicant
And
E[...]
B[...]
Respondent

Delivered: This judgment is handed down electronically by circulation to the parties through their legal representatives' email addresses.
The date for the hand-down is deemed to be 27 January 2025.

JUDGMENT

MAKOTI AJ

Introduction

- [1] Care and parental rights to the parties minor child (who is 4 years old) are at issue in this application. He was born on 31 May 2020 and due to turn five in a few months. Both the parties were residing in the area of Thabazimbi when they were together and even after they separation as husband and wife, a town in which they have stayed as a married couple. Their marriage has reached turbulence and the parties are engaged in divorce proceedings. This affects their minor child's care and contact.
- [2] Primary care for the minor child is at issue. The parties do not agree on what should be the appropriate structure for the care of the minor child. While they have obtained a report of the Family Advocate, the applicant wants the current arrangement to be maintained and that a psychologist be appointed to assess the child. The respondent is not opposed to the appointment of a psychologist, but does not agree to contribute to the costs to be occasioned thereby.
- [3] This application was first before court on 12 May 2022 as an urgent application. On that occasion an interim court order was granted by Phatudi J (as he was then) in terms of which the parties were accorded equal parental rights. I deem it unnecessary to rehash the full terms of the court order, save to mention that in terms of paragraph 4 thereof the order was to operate pending an investigation and the production of a report by the Family Advocate. The matter was again before court on 11 July 2023 where another court order was granted by Kganyago J.
- [4] On the terms of the order by Phatudi J any of the parties could approach court for a fresh determination once a report by the Family Advocate was obtained. Before that could happen, however, the parties reached their own agreement to amend the order. They agreed that each of them would stay with the minor child for a week, from Friday 17H00

until Friday of the following week at the same time.

Family Advocate's report

[5] A report by the Family Advocate was submitted on 24 January 2024. In the report the Family Advocate has made the following findings inter alia that:

[5.1] The status quo was not in the best interests of the minor child;

[5.2] With the minor child going to Grade RR in 2025, his absence for two weeks from his school for a period of two weeks in a months is affecting him and, as a result, the child was struggling to make friends at school;

[5.3] It had become impractical to maintain the status quo as the parties were now residing about 150 kilometres apart;

[5.4] The Applicant lacked support system as he was living alone and that it posed challenges for the minor child's safety on the occasions when the Applicant is called to work on emergency basis.

[6] Based on the contents and recommendations from the Family Advocate's report, the parties have returned to court still being in disagreement with regard to the primary care of their minor child. The respondent seeks variation or amendment of the court order and the inter partes agreement. In pith, she now wants an order from this court that aligns with the best interests of the minor child. The applicant is opposed to it and, as indicated, wants an appointment of a psychologist to further assess the minor child.

Legal principles

[7] Care and contact between parent(s) and minor children is an emotive subject. However, it is a duty of the court to transcend over the emotional issues in order to properly look after the interests of the minor child. A court achieves this by considering expert report(s) before it, including a report composed by the Family Advocate. Importantly, the court does not merely 'rubber stamp' the findings and recommendations of any of the reports before it.

[8] In *Shazwin v Laufer*[1] the duty of the court dealing with a case for care of minor child was explained thus:

"In view of the circumstances of this case, I think it necessary to make a few comments on the duty of a Court, sitting as upper-guardian of minor children, when it has to resolve a dispute concerning custody. To the Court, as upper- guardian, the problem of custody is a somewhat singular subject, in which there is substantially one norm to applied, namely the predominant interests of the child."

[9] This accords with the provisions of section 28 of the Constitution which provides that the interests of minor children, being a vulnerable group, are paramount.[2] This important constitutional principle of the best interests of minor children has also found legislative expression in section 9 of the Children's Act.[3]

- [10] The respondent contends that because of the change in circumstances of the minor child, who will be moving into a different grade at school, there is need to ensure better stability in his care. Under the current situation the minor child is enrolled in two grades at two schools, taking into account that the respondent has relocated and is staying in Brits in the North West Province. The submissions of the respondent that the minor child's interest are not served by the current situation are supported by the Family Advocate, who expressed concern about the impact of the status quo on the minor child.
- [11] The important part of the report is the impracticality of maintaining the status quo, given the change in residency and schooling for the minor child. Also, having consulted the parties as well, the Family Advocate recorded that they were both concerned that '... the child was not coping due to the instability that comes with the shared residence'. In comparison, it has been noted that there is better stability for the minor child if he was with the respondent as she had support system, having a new partner and a helper to assist with the child's care. This was in accordance with a report by the appointed Family Councillor, one Mr Zondi.
- [12] It is important and our courts have consistently held that there is need for stability in children's lives. Our jurisprudence recognises the importance of maintaining consistency in young children's lives.[4] In this case one wonders whether it is helpful to the minor child's stability to be attending the same grade at two different schools. In *Mekgwe and Letlatsa*[5] the Court expressed that children's existing environment should not readily be disturbed, and any unnecessary moves should be discouraged

and avoided on the grounds of security and stability. Court also universally recognise that a stable routine is considered to be in the interests of children, especially those who are still of a tender age.[6]

- [13] Though sitting at opposing ends, the parties contend that they are concerned with what is in the best interests of the minor child. Given the history of this matter, I am not convinced that they are truly pursuing the interests of the minor child. It is important what the Family Advocate has stated. And that should lead to some changes in how the child is brought up. The fact that he is finding it difficult to sustain friendships is a factor that should not escape this Court's attention.

- [14] The earlier order of Phatudi J read in part as follows:

"4. Pending the investigation and report by the Family Advocate, the following interim order is made:

4.1 Both parties shall retain full parental responsibilities and right in respect of the minor child, namely [...] born 31 May 2020, (hereinafter referred to as "the minor child") as provided for in section 18 of the Children's Act No. 38 of 2005 (hereinafter referred to as "the Act").

...

4.2.1 the minor child's primary care and residence shall vest with the parties jointly."

[15] A report of the Family Advocate has been obtained, which the applicant is not happy with. That may be so but there are certain facts which cannot be gainsaid, including the minor child's progression at school. It seem to me to be in the best interests of the minor child to have stability, not only in the home situation, but at school too. The current situation has to be disturbed to an extent.

[16] The alteration of the status quo should still serve the best interests of the minor child in that the minor child must maintain contact with both parents. In LKM and Another v NFM and Others[7] where the Court held –

“This is, however not the end of the matter before me. The practical reality is even if the applicants are compelled to issue an application in the children's Court for the suspension of the order granted on 25 April 2022, the immediate question is whether the order as it relates to the first respondent's contact with her child for 29 and 30 April 2022 should proceed as ordered by the children's Court. Although the applicants' did not make out a case that the first respondent poses any threat to the minor, I have to consider that, be it because of the first respondent's voluntary absence or the applicants denying her contact, the last contact that the first respondent had with her child was during November 2021. It would, however, be in the minor child's best interest to resume having contact with her biological mother as soon as possible. This being said, it would be in the best interest of the child to ensure that the first contact is not overwhelming but gradually phased in.”

[17] The same was expressed in ND v PT[8] in which the Court held amongst others that:

“The absence of contact and the resultant failure to establish a relationship between a young child and one of the parents is not in the best interests of a child. Additionally, the longer a young child is denied such contact the more difficult it becomes to establish a relationship between the relevant parent and the child.”

[18] At issue before me was only the question of primary residence of the minor child which, as I have indicated, has to be altered as it is no longer in the best interests of the minor child to maintain the current status quo. The applicant wants an investigation by an expert psychologist and the respondent is not averse to it. Thus, the changes will sustain pending an investigation and reporting by a psychologist. The remainder of the orders granted by Phatudi J need not be disturbed.

[19] Both parties want costs in the event of success. Due to the nature of the matter and in an attempt to foster cooperation between the parties, I am not inclined to award costs to any of the parties in this matter.

Order

[20] I make the following order:

“1. Pending an investigation and submission of a report by a psychologist, the primary care and residence of the minor child shall be with the respondent.

2. The applicants shall have reasonable access and contact with the minor child, as follows:

2.1 on alternate weekends;

2.2 on alternate school holidays;

2.3 during fathers' day and on the applicant's birthday provided that those days fall on a weekend.

3. No order as to costs."

M. Z. MAKOTI

ACTING JUDGE OF THE HIGH COURT

LIMPOPO DIVISION

APPEARANCES:

FOR APPLICANT

: ADV CJ MANERWECK

SMIT VOSLOO ATTORNEYS

c/o AH BURGER ATTORNEYS INC

POLOKWANE

FOR FIRST RESPONDENT : ADV S NIEMANN

WYNAND DU PLESSIS ATTORNEYS

c/o KHAMPHERBEEK, TWINE &

POGRUND ATTORNEYS,

DATE HEARD: 11 SEPTEMBER 2024

DATE DELIVERED: 27 JANUARY 2025

[1] Shawzin v Laufer 1968 (4) SA 657 (AD) 662G-H.

[2] Section 28(1) of the Constitution.

[3] Act 38 of 2005.

[4] AS v CHPS 2022 JDR 0623 (GJ).

[5] Mekgwe v Letlatsa 2018 JDR 1959 (FB) p 30.

[6] JO v AO 2017 JDR 1691 (GJ).

[7] (16859/22) [2022] ZAGPPHC 269 (29 April 2022) para 13.

[8] (25792/2020) [2022] ZAGPJHC 13 (18 January 2022).

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